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In the Supreme Court of the United States

OCTOBER TERM, 1982

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases: Page

California State Board of Education v. *Boyer*, No. 78-3385 (9th Cir. Nov. 1, 1979) 12
EEOC v. *Wyoming*, No. 81-554 (Mar. 2, 1983) 13
Fullilove v. *Klutznick*, 448 U.S. 448 13
National League of Cities v. *Usery*, 426 U.S. 833 ..... 12, 13
New Jersey v. *Department of Health & Human Services*, 670 F.2d 1284, cert. denied, No. 81-2061 (Oct. 4, 1982) 10
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 6
West Virginia v. *Hufstedler*, No. 79-1338 (4th Cir. Nov. 4, 1980) 12

Constitution, statutes and regulations:

U.S. Const.:

Art. I, § 8, cl. 3 (Commerce Clause) 12
Amend. X 12, 13

Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2347 3
Education Consolidation and Improvement Act of 1981, 20 U.S.C. (Supp. V) 3801 *et seq.* 1

Section 552, 20 U.S.C. (Supp. V) 3801 2
Section 553, 20 U.S.C. (Supp. V) 3802 2-3
Section 554(c), 20 U.S.C. (Supp. V) 3803 (c) 2
Section 596(a), 20 U.S.C. (Supp. V) 3876 (a) 3

Elementary and Secondary Education Act of 1965, Title I, 20 U.S.C. (Supp. V) 2701 *et seq.*:

Section 185, 20 U.S.C. (Supp. V) 2835 ..... 2, 3
Section 185(b), 20 U.S.C. (Supp. V) 2835 (b) 2, 15

Federal Claims Collection Act of 1966, 31 U.S.C. 951 *et seq.*:

Section 3(a), 31 U.S.C. 952(a) 7
Section 4, 31 U.S.C. 953 ..... 6, 7

Constitution, statutes and regulations—Continued	Page
General Education Provisions Act, 20 U.S.C. (& Supp. V) 1221 *et seq.*:	
Section 400(b), 20 U.S.C. 1221(b)	3
Section 435, 20 U.S.C. (Supp. V) 1232d	3
Section 452, 20 U.S.C. (Supp. V) 1234a	3, 4
Section 452(e), 20 U.S.C. (Supp. V) 1234a (e)	3, 4
Section 452(g), 20 U.S.C. (Supp. V) 1234a (g)	6
Section 456, 20 U.S.C. (Supp. V) 1234e	9
Section 456(a)(2), 20 U.S.C. (Supp. V) 1234e (a)(2)	9
Omnibus Budget Reconciliation Act of 1981, Title V, Pub. L. No. 97-35, 95 Stat. 463	2
Pub. L. No. 91-230, 84 Stat. 164	3
5 U.S.C. 553(b)(3)(A)	11
20 U.S.C. 241e(a)	10
20 U.S.C. 241f(a)	10
20 U.S.C. 241j	5
20 U.S.C. 241k	12
20 U.S.C. 242(b)	11
20 U.S.C. 884	6
4 C.F.R.:	
Section 102.2	15
Section 102.3(a)	15
Section 102.10	15
45 C.F.R. Part 30 (1968)	11
Miscellaneous:	
128 Cong. Rec. (daily ed. Aug. 10, 1982):	
pp. H5480-H5483	4
p. S10109	4
47 Fed. Reg. (1982):	
pp. 20343-20345	9
pp. 23002-23003	9
pp. 32856-32881	4
pp. 52340-52366	4
p. 52348 (to be codified at 34 C.F.R. 200.57 (a)(2))	4
H.R. Rep. No. 93-805, 93d Cong., 2d Sess. (1974)	6

Miscellaneous—Continued

Page

H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. (1978) 3
S. Rep. No. 1331, 89th Cong., 2d Sess. (1966) 7
S. Rep. No. 91-634, 91st Cong., 2d Sess. (1970) 3

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1. Respondent Pennsylvania and amici curiae National Association of Counties, *et al.*, and Maryland *et al.*, assert that enactment of Chapter 1 of the Education Consolidation and Improvement Act of 1981 ("ECIA") (20 U.S.C. (Supp. V) 3801 *et seq.*) repealed the explicit recoupment provision of Title I

(Section 185(b) of Title I, 20 U.S.C. (Supp. V) 2835(b)), so that the Secretary no longer has authority to recover misspent grant funds.[1] Citing the rule that a court must "apply the law in effect at the time it renders its decision," they conclude that the alleged lack of administrative authority to recover misspent Chapter 1 funds precludes collection in the instant cases (Pa. Br. 41-42; NAC Br. 15, 23-24; Md. Br. 6). This argument is incorrect.[2]

Section 554(c) of Chapter 1 states that provisions of Title I, unless "specifically made applicable by this []chapter, shall not be applicable *to programs authorized under this* []*chapter*" (20 U.S.C. (Supp. V) 3803(c); emphasis added). Section 185 of Title I (the recoupment provision) was not one of the Title I provisions specifically made applicable to the Chapter 1 program, but it does not follow that Section 185 has been repealed. Section 554(c) is expressly limited to Chapter 1 programs: *i.e.*, those funded between October 1, 1982 and September 30, 1987 (20

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[1] Chapter 1 of the ECIA was enacted as part of Title V of the Omnibus Budget Reconciliation Act of 1981 (Pub. L. No. 97-35, 95 Stat. 463) and superseded the Title I program as of July 1, 1982. While payments under the Chapter 1 program are made on the basis of provisions in the Title I statute, Chapter 1 changed and generally reduced the substantive program requirements attached to these funds for Fiscal Years 1983-1987. See 20 U.S.C. (Supp. V) 3801 and 3802.

[2] The further contention (Pa. Br. 44) that the less stringent substantive program requirements in the ECIA should be applied retroactively to excuse the charged audit violations goes to the merits of the underlying controversy, which is not before the Court. See also N.J. Br. 47-50. In any event, we note that Congress expressly made Chapter 1 applicable prospectively, to grants awarded for FY 1983-1987 (20 U.S.C. (Supp. V) 3802).

U.S.C. (Supp. V) 3802). For Title I funds previously misspent, Section 185 is still in effect; it continues to provide explicit statutory authority for the Secretary to require repayment of the funds at issue here.

In any event, reliance on Section 185 is unnecessary, because sufficient statutory repayment authority is also provided in Section 452 of the General Education Provisions Act ("GEPA"). 20 U.S.C. (Supp. V) 1234a.[3] Section 452 mandates specific guidelines to be followed by the Secretary in resolving final audit determinations under any state-administered federal education program, including Title I and Chapter 1.[4] Section 452(e) provides specifically that a final decision of the Secretary upholding a final audit determination that federal funds have been misspent "shall establish the amount of the audit determination as a claim of the United States which the State or the local educational agency shall be required to pay to the United States and which may be collected by the Secretary in accordance with

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[3] The GEPA, enacted in 1970 as part of Pub. L. No. 91-230, 84 Stat. 164, applies to all education programs administered by the Secretary of Education, except where there is a specific statutory provision precluding applicability. 20 U.S.C. 1221(b). See also S. Rep. No. 91-634, 91st Cong., 2d Sess. 73 (1970).

[4] Part E of GEPA, which includes Section 452, was enacted in the Education Amendments of 1978 (Pub. L. No. 95-561, 92 Stat. 2347) to "consolidate most of the provisions relating to enforcement and judicial review in existing State operated programs and [establish] a comprehensive system of enforcement by the Commissioner [now Secretary] of the requirements relating to education programs." H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. 141 (1978). See 20 U.S.C. (Supp. V) 3876(a); 20 U.S.C. (Supp. V) 1232d.

the Federal Claims Collection Act of 1966." 20 U.S.C. (Supp. V) 1234a(e). Accordingly, the Department of Education's final regulations for the administration of Chapter 1 explicitly recognize the Secretary's authority to recover any funds misspent under that program. 47 Fed. Reg. 52340-52366 (1982).[5]

2. Respondents' primary claim, that Title I as originally enacted contained a clear and comprehensive specification of the remedies available so that no additional remedies should be implied, is belied by their disagreement regarding precisely what remedies were specified. Thus, while New Jersey recognizes the Secretary's right to offset misspent funds against subsequent grant funds (N.J. Br. 13, 16

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[5] These regulations provide that:

> [a]n SEA shall repay to the Department the amount of Chapter 1 funds determined by the audit not to have been spent in accordance with applicable law.

47 Fed. Reg. 52348 (1982) (to be codified at 34 C.F.R. 200.57(a)(2)).

The Department originally assumed that the GEPA was not applicable to Chapter 1 (although even then it asserted the right to recover funds misspent under Chapter 1; see 47 Fed. Reg. 32856-32881 (1982)). Resolutions of both Houses of Congress disapproved regulations based on this assumption, providing clear evidence of congressional intent that the GEPA, including Section 452, applies to Chapter 1. 128 Cong. Rec. H5480-H5483 (daily ed. Aug. 10, 1982); 128 Cong. Rec. S10109 (daily ed. Aug. 10, 1982). These resolutions are apparently the "Congressional vetoes" to which respondent Pennsylvania refers (Pa. Br. 40), incorrectly suggesting that they are evidence of a congressional view that the agency has overstepped its authority in seeking to recoup misspent grant funds. Nor is such a view to be inferred from the limitations on the Secretary's authority in the new Chapter 1 programs. Instead, those limitations reflect current goals of reducing substantive federal restrictions on grant funding and reducing paperwork.

n.10, 30-33),[6] Pennsylvania vehemently denies the existence of even that right, claiming that it has no obligation to account to the federal grantor for misspent funds in the absence of a showing of criminal misappropriation (Pa. Br. 19-20 & n.18). This fundamental disagreement between respondents over the scope of the express statutory remedies available strongly suggests that the statutory remedial scheme is not spelled out in such explicit detail that it leaves no room for the implication of further remedies or the consideration of legislative intent.[7]

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[6] New Jersey appears to confuse the statutory authorization to withhold funds until the Secretary is satisfied that the state's programs have come into compliance with federal standards (20 U.S.C. 241j) with the authority to offset to recoup misspent funds (see, *e.g.*, N.J. Br. 33-34). As we explain in our main brief (at 32), these two remedies are quite distinct. Moreover, the type of offset that New Jersey asserts is the Secretary's sole means of recouping misspent funds appears to be precisely the remedy that the court of appeals rejected as inappropriate (Pet. App. 21a-22a). Finally, it is simply incorrect to contend, as New Jersey does (N.J. Br. 3), that the withholding of future grant funds is a less severe remedy than recoupment, particularly since, before the 1978 Amendments, the withholding contemplated by 20 U.S.C. 241j would have required suspension of *all* Title I payments to a State or LEA. The offset proposed by New Jersey, therefore, is in many ways more drastic, and it penalizes Title I beneficiaries twice: once at the time of the original conversion and again at the time of the later reduction in the federal grant.

[7] To rebut the clear evidence of legislative intent demonstrated by the 1974 statute of limitations (Gov't Br. 33-34), Pennsylvania states that "[i]t must be remembered that the statute of limitations is part of GEPA and is generally applicable to all education grant programs, some of which have repayment sanctions" (Pa. Br. 32; footnote omitted). But the 1974 limitations provision on which we rely was an

Moreover, respondents misapprehend the utility of even those remedies that they concede the Secretary may employ under Title I. Respondents suggest that the Secretary is limited to disapproving a state application that fails to conform to the requirements of the statute or withholding Title I funds until the state program comes into compliance (see N.J. Br. 17, 37; Pa. Br. 18). But these remedies have no effect on a state's failure to comply with program requirements in the past. And even in the case of a continuing violation, the disapproval sanction has only a prospective effect and cannot provide make-whole relief. It is therefore an essential and inherent part of any grant-in-aid scheme, including Title I, that the federal grantor be empowered to recoup payments applied by recipients in violation of the terms of the grant, in addition to any other remedies or sanctions expressly provided. Cf. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979) (implying a private action for rescission and restitution under the Investment Advisers Act of 1940, because "when Congress declared in [the Act] that certain contracts are void, it intended that the customary legal incidents of voidness would follow").

3. Respondents argue that Section 4 (31 U.S.C. 953) of the Federal Claims Collection Act of 1966

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amendment to the Elementary and Secondary Education Act, and was not part of GEPA. See 20 U.S.C. 884. Furthermore, both the language of the statutory provision and the legislative history specifically refer to the Title I program. See *ibid.*; H.R. Rep. No. 93-805, 93d Cong., 2d Sess. 78-79 (1974). Although there is also a statute of limitations provision in GEPA, which was enacted as part of the 1978 Amendments (see 20 U.S.C. (Supp. V) 1234a(g)), that was not the provision cited in our brief.

demonstrates that the Act was not intended to provide an independent source of authority for administrative collection efforts (Pa. Br. 34; N.J. Br. 37 n.18).

Respondents misconstrue Section 4, which states that "[n]othing in this chapter shall increase or diminish the existing authority of the head of an agency to litigate claims" (31 U.S.C. 953). This simply means that the Act does not purport to authorize an agency to bring a collection suit in federal court; instead, the Act preserves the requirement that agencies refer claims to the Department of Justice for litigation.

Legislative history supports the plain language. The main purpose behind enactment was "to avoid unnecessary litigation." S. Rep. No. 1331, 89th Cong., 2d Sess. 1 (1966). Although agencies previously had power to collect debts, they lacked the related power to compromise or settle claims. As a result, they had to refer all disputed cases—regardless of merit or the prospect of successful collection—to the Department of Justice for litigation. In order to reduce the resulting court congestion and eliminate waste of resources, Congress passed the Claims Act to confer additional authority on agencies to compromise or settle claims short of litigation. Section 4 merely makes clear that agency authority to collect and to compromise or settle claims does not also include the authority to litigate; that authority remains with the Department of Justice.

Respondents' construction of Section 4 is inconsistent with the Act's unequivocal directive that all agencies "shall attempt collection of all claims * * * arising out of the[ir] activities" (31 U.S.C. 952(a)). If an agency has no express independent authority to collect claims administratively, according to respondents

the agency would have no authority to comply with that requirement.[8]

4. Respondents assert that, for a variety of reasons, it would be unfair or otherwise inappropriate to require them to repay the misspent funds. None of the reasons asserted has merit, and in any event Congress resolved this issue against the States when it rejected a proposal that would have relieved state grantees of their obligation to repay Title I funds misspent before 1978 (Gov't Br. 36 n.46).[9]

a. Respondent Pennsylvania asserts that its violations of Title I standards were, at most, technical ones, resulting in no unjust enrichment to the State (Pa. Br. 28-29).[10] But if, as the Education Appeal

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[8] Nor does respondents' construction comport with the historical understanding of the Department of Justice and the Comptroller General, which has been accepted by Congress (see Gov't Br. 25-31).

[9] We note in addition that respondents' repeated assertions (see, *e.g.*, Pa. Br. 29-30) that recoupment is inconsistent with the basic policies of the Title I program is belied by the fact that Congress expressly provided that remedy in the 1978 Amendments.

[10] Pennsylvania did not contest the substance of the audit violations before the court of appeals. New Jersey did contest the findings, but the court of appeals did not reach those issues.

Respondents paint a picture of "an innovative, untested federal program" (N.J. Br. 21), filled with obscure requirements, and they attempt to convey the impression that recoupment would be inequitable because numerous good faith deviations from statutory and administrative conditions are inevitable. Needless to say, the reasonableness of a grantee's interpretation of an ambiguous regulation is a factor considered by the Secretary in determining whether to seek recoupment of wrongfully expended grant funds (see Pet. App. 65a-68a). Moreover, the grantee is always free to seek the Secretary's advice concerning program requirements. How-

Board found, federal monies were spent for projects that were not allowable under the federal statute and regulations, the grantees were enriched in a manner not contemplated by the statute, because they were enabled to provide services to their citizens desired by the grantees but not authorized by the federal program. That is sufficient unjust enrichment to require repayment of the misspent funds. Respondent's additional claim (see, *e.g.*, Pa. Br. 21) that administrative recoupment would serve no purpose under Title I overlooks both the deterrent value of requiring restitution and the "grantback" provision of Section 456 of the GEPA (20 U.S.C. (Supp. V) 1234e), which authorizes the Secretary to return to the State or LEA up to 75% of the repaid funds for approved programs benefitting eligible children (see Amicus Curiae Lawyers Comm. Br. 7, 19-22).[11]

b. Respondents' claims that the federal government shares the responsibility for the improper expenditures, and failed to warn the States that they would be required to repay sums improperly spent,

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ever, the Secretary's decisions to seek recoupment in these cases are based on clearly stated and critical Title I requirements that had been in effect for several years at the time of the violations (see, *e.g.*, J.A. 15-16, 59).

[11] The grantback funds must be used "to the extent possible, for the benefit of the population that was affected by the failure to comply or by the misexpenditures that resulted in the audit exception" (20 U.S.C. (Supp. V) 1234e(a)(2)).

The grantback provision has in fact been exercised by the Secretary on several occasions. See, *e.g.*, 47 Fed. Reg. 20343-20345 (1982) (grantback to Wisconsin of 75% of repaid funds determined to have been misapplied by the State during the 1967-1972 audit period); 47 Fed. Reg. 23002-23003 (1982) (grantback to the District of Columbia of 75% of repaid funds misapplied during the audit period from 1973-1977).

are likewise unavailing. The suggestion (Pa. Br. 18-21) that the Department is at fault for failing to discover the violations more promptly ignores the fact that in Title I, as in many other grant-in-aid programs, the grantee states are given primary responsibility for ensuring that monies are properly expended. The federal agency simply does not have the resources, and is not expected, to perform comprehensive policing and enforcement activities. Cf. *New Jersey* v. *Department of Health & Human Services*, 670 F.2d 1284, 1296-1298 (3d Cir.), cert. denied, No. 81-2061 (Oct. 4, 1982).[12]

Respondents' claim (Pa. Br. 37-38, 43; N.J. Br. 35, 37-38) that the States were not on notice of their repayment obligation is equally unconvincing (Gov't Br. 40-41).[13] Respondents make much of the fact that

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[12] New Jersey's statement (Br. 3) that the LEA's applications are sent to the federal government incorrectly suggests that the Department was put on notice of the violations as they occurred. In fact, Title I provided that the LEA's applications were to be sent to, and approved by, the SEA. 20 U.S.C. 241e(a). Only general assurances of the State were provided to the federal government. 20 U.S.C. 241f(a).

[13] New Jersey unsuccessfully argues (Br. 24 n.14) that its repayments of pre-1978 grant funds do not suggest recognition of that obligation. The fact that its $4000 repayment was part of a settlement does not, of course, alter the fact that the State submitted payment for its audit violation. As to the $1306 payment, New Jersey asserts that its "records disclose no such repayment"; it then assumes that the amount "represents the portion of the Newark audit exception for the 1970-71 school year which was not barred by operation of the statute of limitations." New Jersey's assumption is wrong. In 1973, New Jersey repaid $1306 for unallowable Title I expenditures in the Atlantic City School District. These disallowed expenditures were discovered in an earlier audit of Title I programs in the State (Audit Control No. 90067-02).

pre-1978 agency regulations do not specifically refer to repayment, but do explicitly mention disapproval and withholding. Pa. Br. 33; cf. N.J. Br. 44 n.19. But this merely indicates that the agency, like Congress, did not deem it necessary to spell out so fundamental a concept as the one that converted funds must be repaid. See Amicus Curiae Lawyers Comm. Br. 8-10. It is also apparent that the regulations merely tracked the express provisions of the Title I statute, which at the time did not provide expressly for recoupment. Moreover, the existence of claims collection regulations incorporating the Federal Claim Collection Act Standards (see 45 C.F.R. Part 30 (1968)) eliminated the need to provide for specific repayment procedures in the Title I regulations.[14] See also Gov't Br. 8-9, 28-31, 32-33 (audit provisions).

In sum, the Secretary has clear authority to recover administratively the monies owed, and he retains broad discretion to exercise that authority by appropriate collection devices subject to judicial review for arbitrariness.[15]

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[14] Contrary to arguments made by Pennsylvania (Br. 6-7) and amicus curiae National Association of Counties (Br. 11, 24-26), the Secretary was not required to promulgate a regulation before he could demand recovery. Under the Title I statute, the Secretary is expressly authorized to administer the Title I program, issue regulations and "perform such other functions as he finds necessary to carry out the provisions of [Title I]." 20 U.S.C. 242(b). Likewise, the procedures of the Title I Audit Hearing Board did not have to be published as formal regulations. Procedural or interpretative rules are exempt from the rulemaking requirements of the Administrative Procedure Act. 5 U.S.C. 553(b)(3)(A).

[15] Pennsylvania incorrectly asserts (Br. 24-25, 44-45) that the Secretary previously took the position that there is no judicial review available to grantees in audit disallowance cases, and that the 1978 Amendments should not be applied

c. New Jersey argues for the first time in this Court that "principles of federalism," and more specifically the Tenth Amendment as interpreted in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), preclude requiring the states to repay misspent Title I funds (N.J. Br. 19, 26-32). *National League of Cities*, however, involved a limitation on Congress's power under the Commerce Clause. See 426 U.S. at 841, 852 n.17. Title I, on the other hand, is an exercise of Congress's Spending Power.

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retroactively. It refers to arguments made by the agency in two cases. (*West Virginia* v. *Hufstedler*, No. 79-1338 (4th Cir. Nov. 4, 1980), and *California State Board of Education* v. *Boyer*, No. 78-3385 (9th Cir. Nov. 1, 1979)), as well as statements made at an oral argument on prehearing motions in its case before the Title I Audit Hearing Board.

The *West Virginia* and *California* cases involved decisions of the Title I Audit Hearing Board that became final prior to enactment of the 1978 Amendments. Consequently, the Department argued that there was no *direct* review in the court of appeals, either under the Title I provision granting judicial review of withholding actions (20 U.S.C. 241k) or the 1978 Amendments, from the Commissioner's final decision to require the repayment of misspent funds from these states. With regard to the 1978 Amendments, the agency argued that the judicial review provisions should not be applied retroactively to audit cases that had reached a final administrative decision prior to enactment of those provisions. These arguments did not suggest that *no* judicial review was available; clearly, the States could have obtained judicial review of these decisions in district court pursuant to the APA.

Similarly, the oral argument before the Title I Audit Hearing Board in Pennsylvania's case predated by a year the 1978 Amendments. In the excerpt referred to by Pennsylvania, the Department correctly stated that Pennsylvania did not at that time have a right of direct appeal to the court of appeals. Pennsylvania would have had a right to judicial review in district court, however, had its case reached a final decision prior to enactment of the 1978 Amendments.

> Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce [state] governments * * * to cooperate voluntarily with federal policy.

Fullilove v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.). No new substantive obligations are being imposed on the States here; respondents were aware from the outset of the Title I program that grant funds could be used only in conformity with express statutory and regulatory conditions (see Gov't Br. 40).

In any event, even judged by *National League of Cities* standards, the Secretary's recoupment decision —seeking the return of *federal* monies used by the States for purposes inconsistent with the *federal* grant—raises no problems under the Tenth Amendment. The State's arguments are substantially answered by this Court's recent decision in *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), which explained that "the principle of immunity articulated in *National League of Cities* is a functional doctrine, * * * whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which the States enjoy a 'separate and independent existence' not be lost through undue federal interference in certain core state functions" (slip op. 8-9; citations omitted). Accordingly, the Court emphasized (*id.* at 11-15), it is necessary in each case to consider the degree of federal intrusion into integral state functions. Finally, the Court rejected the claim (*id.* at 13-14) that federal legislation imposed unacceptable

consequential costs on state programs—a claim similar to New Jersey's budgetary arguments here (N.J. Br. 28-29).

Respondents' assertions that the obligation to repay misspent funds may prove disastrous to the states (Pa. Br. 29; N.J. Br. 29) overlook the fact that the audit exceptions are quite small in comparison to the total amount of Title I funds received by the State. Thus, although the Secretary here seeks recoupment of approximately $1 million from New Jersey, and less than half that from Pennsylvania (Gov't Br. 10-11), the Department of Education informs us that New Jersey has received almost $1 billion and Pennsylvania more than $1.5 billion in Title I and Chapter 1 awards since the program's inception in 1966 [16] (see also Pa. Br. 11 n.13 (amount at issue here "represents only .1% of Pennsylvania's total grant for the years in question")). Given these vast federal awards to respondents for their educational programs, it is most unlikely that repayment of the sums involved here will threaten the financial integrity of their educational systems.[17] Moreover, respondents' dire financial predictions are based on the assumption that the Secretary seeks to require them immediately to forward a check in the full amount owed. The propriety, however, of any particular mode of collection is not properly before this Court. Resolution of that specific issue must await disposition of the case on the merits—presumably on

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[16] These totals include all Title I and Chapter 1 funds awarded to the States, including funds for the LEA programs, for state agency programs for migrant, handicapped and neglected and delinquent children, and for State administration.

[17] In addition, the grantback provision (see note 11, *supra*), would allow the affected State to benefit from up to 75% of the repaid funds.

remand to the court of appeals—and the Secretary's as yet unexercised choice of a specific method of collection (see Gov't Br. 20-21).[18]

CONCLUSION

For the reasons stated here and in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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APRIL 1983

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[18] The Secretary has a variety of options in collecting debts. By first demanding a direct repayment, the Secretary was simply acting in accordance with the Federal Claims Collection Standards. 4 C.F.R. 102.2. If direct repayment is not made, "[c]ollections by offset will be undertaken * * * in every instance in which this is feasible." 4 C.F.R. 102.3(a). Thus, the Secretary always retains the option of recovering misspent Title I funds through some type of offset if a State does not comply with the demand for direct repayment of the funds (Gov't Br. 20-21).

The burden of repaying misspent Title I funds is also tempered by the fact that repayments may be made in installments "over a period not to exceed three years." 20 U.S.C. (Supp. V) 2835(b); see also 4 C.F.R. 102.10 (collection in installments permitted under the Federal Claims Collection Standards).

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